No. 87-548

Supreme Court, U.S.
FILED
MAY 24 1988
JOSEPH F. SPANIOL, JR.

In the Supreme Court of the United States

OCTOBER TERM, 1987

TRANS WORLD AIRLINES, INC., PETITIONER

v.

INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD AS AMICUS CURIAE SUPPORTING PETITIONER

CHARLES FRIED
Solicitor General

LOUIS R. COHEN
Deputy Solicitor General

GLEN D. NAGER
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

ROSEMARY M. COLLYER
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel
National Labor Relations Board
Washington, D.C. 20570

QUESTION PRESENTED

Whether the Railway Labor Act, 45 U.S.C. 151 *et seq.*, requires an air carrier to displace non-striking employees and employees who returned to work prior to the end of an economic strike in order to reinstate full-term strikers with greater seniority, where there is no back-to-work agreement and where no provision of the collective bargaining agreement authorizes the exercise of seniority rights to obtain reinstatement after a strike.

TABLE OF CONTENTS

	Page
Interest of the National Labor Relations Board	1
Statement	2
Summary of argument	5
Argument:	
The court of appeals misapplied NLRA principles in concluding that an RLA employer is required, at the conclusion of an economic strike, to displace non-striking employees and employees who returned to work prior to the end of the strike in order to reinstate full-term strikers with greater seniority	7
Conclusion	17

TABLE OF AUTHORITIES

Cases:

Belknap, Inc. v. *Hale*, 463 U.S. 491 (1983)	10, 12
Bio-Science Laboratories, 209 N.L.R.B. 796 (1974)	13
Brotherhood of R.R. Trainmen v. *Jacksonville Terminal Co.*, 394 U.S. 369 (1969)	1, 16, 17
Florida East Cost Ry. v. *Brotherhood of R.R. Trainmen*, 336 F.2d 172 (5th Cir. 1964), cert. denied, 379 U.S. 990 (1965)	17
George Banta Co. v. *NLRB*, 686 F.2d 10 (D.C. Cir. 1982), cert. denied, 460 U.S. 1082 (1983)	5, 15
Giddings & Lewis, Inc. v. *NLRB*, 675 F.2d 926 (7th Cir. 1982)	16
Hot Shoppes, Inc., 146 N.L.R.B. 802 (1964)	10
IFFA v. *TWA*, 127 L.R.R.M. 3266 (W.D. Mo. 1988)	3
International Ass'n of Machinists & Aerospace Workers v. *J.L. Clark Co.*, 471 F.2d 694 (7th Cir. 1972)	5, 15
Laidlaw Corp. v. *NLRB*, 414 F.2d 99 (7th Cir. 1969), cert. denied, 397 U.S. 920 (1970)	12
Lone Star Indus., 279 N.L.R.B. No. 78 (Apr. 28, 1986)	13
Mastro Pastics Corp. v. *NLRB*, 350 U.S. 270 (1956)	10
NLRB v. *Erie Resistor Corp.*, 373 U.S. 221 (1963)	5, 10, 11, 15
NLRB v. *Fleetwood Trailer Co.*, 389 U.S. 375 (1967)	11, 12

Cases – Continued: Page

NLRB v. *Great Dane Trailers, Inc.*, 388 U.S. 26 (1967) ... 12
NLRB v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938) 3, 9, 12
NLRB v. *Plastilite Corp.*, 375 F.2d 343 (8th Cir. 1967) ... 12
Pattern Makers' League of North America v. *NLRB*, 473 U.S. 95 (1985) 15
Randall, Div. of Textron, Inc. v. *NLRB*, 687 F.2d 1240 (8th Cir. 1982), cert. denied, 461 U.S. 914 (1983) 5, 15-16
TWA v. *IFFA*, 809 F.2d 483 (8th Cir. 1987), aff'd, No. 86-1650 (Mar. 2, 1988) 4
United Steelworkers, Local 8560 (Sparta Mfg., Div. of Spartek, Inc.), 103 L.R.R.M. 1238 (1979) 12

Statutes:

National Labor Relations Act, 29 U.S.C. (& Supp. III) 151 *et seq.* 1, 3
§ 2(3), 29 U.S.C. 152(3) 8, 16
§ 7, 29 U.S.C. 157 8
§ 8(a), 29 U.S.C. 158(a) 8, 9
§ 8(a)(1), 29 U.S.C. 158(a)(1) 9
§ 8(a)(3), 29 U.S.C. 158(a)(3) 9
§ 8(b)(2), 29 U.S.C. 158(b)(2) 12
§ 8(b)(3), 29 U.S.C. 158(b)(3) 12
§ 13, 29 U.S.C. 163 8
Railway Labor Act, 45 U.S.C. 151 *et seq.* 1, 3
§ 1 Fifth, 45 U.S.C. 151 Fifth 16

In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-548

TRANS WORLD AIRLINES, INC., PETITIONER

v.

INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE NATIONAL LABOR RELATIONS BOARD

The National Labor Relations Board (NLRB) administers the National Labor Relations Act (NLRA), 29 U.S.C. (& Supp. III) 151 *et seq.*, and has primary responsibility for defining the rights of striking employees covered under that statute. While this case arises under the Railway Labor Act (RLA), 45 U.S.C. 151 *et seq.*, and the NLRA has "no direct application" to the RLA (*Brotherhood of R.R. Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 377 (1969)), the court below applied principles developed under the NLRA in deciding that an RLA employer must displace non-striking employees and employees who returned to work prior to the end of an economic strike in order to reinstate full-term strikers with greater seniority. The case is therefore of significant interest to the NLRB.

STATEMENT

1. On March 7, 1986, respondent union, the Independent Federation of Flight Attendants (IFFA), commenced a strike against petitioner, Trans World Airlines, Inc. (TWA), over the terms and conditions of a new contract for flight attendants (Pet. App. 2a). Petitioner decided to continue operating during the strike (*ibid.*). It therefore hired approximately 1,270 new flight attendants and told them that they would be permanent employees of the airline (*ibid.*). It also continued to employ approximately 1,280 "cross-over" flight attendants—*i.e.*, flight attendants who did not strike or who resumed work during the strike—and, during the course of the strike, hired an additional 1,100 permanent flight attendants (*id.* at 2a-3a, 59a-60a). Finally, it began training an additional group of 463 employees—called "trainees"—to be flight attendants (*id.* at 3a, 59a-60a).

On May 17, 1986, respondent union made an unconditional offer to return to work on behalf of the approximately 5,000 striking flight attendants (Pet. App. 3a). Petitioner, however, decided to retain its new hires, cross-over employees, and trainees (*ibid.*). Therefore, while it agreed to reinstate about 200 of the striking flight attendants in order of their seniority, it placed the remainder on a preferential hiring list (*id.* at 3a, 51a, 53a). Respondent union thereupon filed this action in federal district court, alleging that petitioner's conduct violated the RLA and requesting, inter alia, that the court declare that the striking flight attendants, as economic strikers, were entitled to reinstatement over the employees hired during the strike, the cross-over employees who had less seniority than the striking employees, and the trainees (*id.* at 3a, 19a).[1]

[1] In a separate suit, respondent union also argued that the striking employees were unfair labor practice strikers and entitled to reinstatement on that basis (Pet. App. 5a n.3). On March 9, 1988, the district court rejected that contention, holding that the strike was an economic strike. *IFFA* v. *TWA*, 127 L.R.R.M. 3266 (W.D. Mo.).

2. On the parties' cross-motions for summary judgment, the district court held that the striking flight attendants were entitled to displace the trainees but not the newly hired or cross-over employees (Pet. App. 18a-36a). The court determined that the collective bargaining agreement between petitioner and respondent did not give the striking flight attendants a right to exercise their seniority rights to obtain reinstatement at the end of the strike at the expense of cross-over employees (*id.* at 22a); and that labor law principles concerning the rights of strikers developed under the National Labor Relations Act (NLRA), 29 U.S.C. (& Supp. III) 151 *et seq.*, would not confer such a right (Pet. App. 22a-25a); and it rejected respondent's contention that the Railway Labor Act (RLA), 45 U.S.C. 151 *et seq.*, accords greater protection to economic strikers than does the NLRA (Pet. App. 25a). As to the new hires, the court found that they were permanent strike replacements, rather than additions to an expanding workforce, and, accordingly, that, under *NLRB* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938), petitioner was entitled to refuse to displace them in favor of the returning strikers (Pet. App. 26a-29a). Finally, as to the trainees, the court found that they had not assumed flight attendant positions by the end of the strike and, accordingly, that they were not permanent replacements within the meaning of the decision in *Mackay Radio* and could be displaced (*id.* at 29a-35a).

3. The court of appeals affirmed in part and reversed in part (Pet. App. 1a-15a). It initially noted (*id.* at 4a-5a) that, under the NLRA, "[e]mployees who are not working because of a labor dispute remain 'employees' of the em-

ployer unless they obtain other work." It further noted (*id.* at 5a (footnote omitted)) that, under the NLRA, "[w]hen the labor dispute is economic in nature, * * * the employer may hire permanent replacements for strikers in order to continue business operations" and "economic strikers are entitled to reinstatement only as vacancies occur." It then held (*id.* at 5a-14a) that only the new hires, and not the trainees or the junior cross-overs, could be treated as permanent replacements for the strikers.

As to the cross-over employees, the court noted (Pet. App. 7a) that, in an earlier case, *TWA* v. *IFFA*, 809 F.2d 483 (1987) (*TWA I*), it had held that the union security provision of a prior contract between petitioner and respondent continued in effect and that, as a consequence, "all cross-overs must retain their union membership."[2] It added (Pet. App. 7a) that "[petitioner] may not discriminate among union members based on the degree of their union activity." Finally, it concluded (*ibid.* (footnote omitted)) that "[petitioner] may not accord cross-overs permanent replacement status and prevent full-term strikers from displacing cross-overs with less seniority because such action impermissibly discriminates among union members based on the degree of their union activity." The court acknowledged (*id.* at 7a n.4) that the new hires were also required to become union members, but concluded that "[they] cannot be the subject of discrimination based upon union loyalty and activity" because they "were not union members when they began work during the strike."

[2] The Court issued a writ of certiorari to review this decision and, on March 2, 1988, affirmed the Eighth Circuit's judgment by an equally divided vote. *TWA* v. *IFFA*, No. 86-1650. A petition for rehearing was filed, however, and, on April 18, 1988, the Court invited respondent to file a response.

The court found its conclusion supported in cases decided under the NLRA (Pet. App. 8a-10a). First, it noted (*id.* at 8a) that, in *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221 (1963), this Court held that an award of superseniority to permanent replacements and cross-overs unlawfully discriminates against those who engage in union activity. The court found that "several of the concerns voiced by the Court in *Erie Resistor* are applicable to the status of the cross-overs here" (Pet. App. 8a), reasoning that "[a]warding the cross-overs permanent replacement status differentiates [among] employees on the basis of their union activity, induces employees to abandon the strike[,] and is likely to create long-term conflict and division within the workforce of those working together under the union security clause" (*id.* at 9a). Second, it found that "[c]ases that have followed *Erie Resistor* are more explicit concerning the treatment of cross-overs" and that those cases have expressly rejected attempts to afford cross-over employees permanent replacement status (*ibid.*, citing *George Banta Co.* v. *NLRB*, 686 F.2d 10 (D.C. Cir. 1982), cert. denied, 460 U.S. 1082 (1983); *International Ass'n of Machinists & Aerospace Workers* v. *J.L. Clark Co.*, 471 F.2d 694, 698 (7th Cir. 1972); *Randall, Div. of Textron, Inc.* v. *NLRB*, 687 F.2d 1240 (8th Cir. 1982), cert. denied, 461 U.S. 914 (1983)).

SUMMARY OF ARGUMENT

A. The rights of economic strikers under the NLRA are well established. Striking employees are entitled to reclaim their jobs as long as those jobs remain vacant. If there are no vacancies when the strikers first offer to return to work, they are entitled to preferential consideration for vacancies that occur thereafter. An employer commits an unfair labor practice if, at the conclusion of a strike, it refuses to reinstate strikers to their former posi-

tions without prejudice to their seniority or other employment rights, unless it can show that its action was due to "legitimate and substantial business justifications." Refusing to displace permanent replacement employees is, however, such a legitimate and substantial business justification.

B. The court below misapplied these principles developed in the NLRA context in holding that senior returning strikers were entitled to displace junior cross-over employees. An employee who refuses to join or who abandons a strike has the same entitlement to retain or regain his job as a full-term striker. If his job is vacant when he returns, he is entitled to return to that job at that time. If he has stayed in or returned to his job, there is no vacancy in that position, and a returning full-term striker has no entitlement to it. The court of appeals' contrary conclusion has no foundation in NLRA case law.

The suggestion that refusing to displace junior cross-over employees with returning full-term strikers discriminates on the basis of union activity is unfounded. The full-term strikers are not denied reinstatement because of the degree of their union activity. They are denied reinstatement because there is no available vacancy for them to fill.

Nor is there any merit to the suggestion that only new hires who are recruited as permanent replacements for strikers may be treated as permanent employees. The cross-over employees were permanent employees before the strike began and, after the strike begins, the employer cannot refuse to allow them to return to their vacant jobs, or reduce their tenure in those jobs, just because other employees have gone on and remained on strike. To do so would penalize the early returnees for striking and the employees who did not strike at all for the fact that other employees engaged in strike activity. Either penalty would

place the employer in violation of the NLRA. The statute obviously should not be interpreted to be at odds with itself.

The NLRA cases cited by the court below do not support its conclusion that the full-term strikers were entitled to displace the junior cross-over employees. Those cases involve discrimination against strikers that persists after the strikers have returned to their jobs, or discrimination among strikers in selecting which ones will be offered job vacancies. No such discrimination is involved here.

C. It is possible, of course, that the RLA provides protection for returning strikers that the NLRA does not provide. But the court below did not rely on any such argument; respondent has not purported to defend the judgment below on that basis; and the relevant differences in the two statutory schemes in fact point in the opposite direction. Thus, we see no readily apparent basis for finding a reinstatement right in the RLA that entitles returning strikers to displace junior cross-over employees.

ARGUMENT

THE COURT OF APPEALS MISAPPLIED NLRA PRINCIPLES IN CONCLUDING THAT AN RLA EMPLOYER IS REQUIRED, AT THE CONCLUSION OF AN ECONOMIC STRIKE, TO DISPLACE NON-STRIKING EMPLOYEES AND EMPLOYEES WHO RETURNED TO WORK PRIOR TO THE END OF THE STRIKE IN ORDER TO REINSTATE FULL-TERM STRIKERS WITH GREATER SENIORITY

The court below, purporting to follow cases decided under the NLRA, held that the RLA requires an air carrier, at the conclusion of an economic strike, to displace non-striking employees and employees who returned to work prior to the end of the strike in order to reinstate full-term strikers with greater seniority. We believe that the court misunderstood the rights of returning strikers under the NLRA; under that statute, senior full-term strikers are not entitled to displace junior cross-over em-

ployees. Moreover, while it is possible that NLRA-based principles concerning the rights of strikers do not apply in the RLA context, respondent has not advanced any such argument (Br. in Opp. 5-8), and, more importantly, it is doubtful that the RLA accords greater reinstatement rights to strikers than does the NLRA. Accordingly, we believe that the judgment below should be reversed insofar as it requires petitioner to replace junior cross-over employees with senior full-term strikers.

A. The NLRA deals with several aspects of the rights of striking employees. Section 7 of the statute guarantees the right of employees to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection" (29 U.S.C. 157).[3] Section 13 of the statute provides that "[n]othing in this subchapter, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right" (29 U.S.C. 163). Section 2(3) of the statute specifies that, as used in the statute, the term "employee" includes "any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment * * *" (29 U.S.C. 152(3)). And Section 8(a) of the statute (29 U.S.C. 158(a)) makes it an unfair labor practice for an employer to in-

[3] Section 7 provides, in pertinent part, that:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities * * *.

terfere with or discriminate against employees in the exercise of their right to strike.[4] This Court has interpreted and applied these provisions in a series of important cases.

First, in *NLRB* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938), the Court held that an employer may carry on its business during an economic strike with replacement employees and is not required (when the strikers desire to return) to displace replacement employees who have been promised permanent employment. The Court explained that "an employer, guilty of no act denounced by the statute, has [not] lost the right to protect and continue his business by supplying places left vacant by strikers" (*id.* at 345); that "he is not bound to discharge those hired to fill the places of strikers, upon the election of the latter to resume their employment, in order to create places for them" (*id.* at 345-346 (footnote omitted)); and that he is required "to reinstate only so many of the strikers as there [are] vacant places to be filled" (*id.* at 346).[5]

[4] Section 8(a) of the NLRA (29 U.S.C. 158(a)) provides, in pertinent part, that:

> It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
>
> * * * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *.

[5] The Court in *Mackay Radio* added, however, that an employer may not discriminate on the basis of union activity in determining which returning strikers will have to wait for vacancies to open (304 U.S. at 346-347). Rather, it must use a non-discriminatory criterion—such as "skill or ability" (*id.* at 347).

The Court in *Mackay Radio* did not address whether an employer must affirmatively show a need to operate with permanent replace-

The Court revisited the issue of economic strikers' rights in *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221 (1963).[6] In *Erie Resistor*, the Court held that an employer may not grant superseniority to replacement employees or to employees who abandon a strike, even if the employer believes that such offers are necessary to the continuance of the employer's business. The Court found, as had the Board, that "[s]uper-seniority affects the tenure of all strikers[,] whereas permanent replacement, proper under *Mackay*, affects only those who are, in actuality, replaced" (*id.* at 230); that "[s]uper-seniority made available to striking bargaining unit employees as well as to new employees is in effect offering individual benefits to the strikers to induce them to abandon the strike" (*ibid.*); that superseniority "deals a crippling blow to the strike effort," for "those with low seniority have the opportunity to obtain the job security which ordinarily only long years of service can bring, while conversely, the accumulated seniority of the older employees is seriously diluted" (*ibid.*); and that "[s]uperseniority renders future bargaining difficult, if not impossible, for the collective bargaining representative," because, "[u]nlike the replacement granted in *Mackay*[,] which ceases to be an issue once the strike is over, [super-seniority] creates a cleavage in the plant continuing long after the strike is ended" (*id.* at 231). Accordingly, while it reiterated that, under

---

ments. The Board has held that an employer need not do so. See *Hot Shoppes, Inc.*, 146 N.L.R.B. 802, 805 (1964). In *Belknap, Inc.* v. *Hale*, 463 U.S. 491, 504-505 n.8 (1983), without deciding the issue, the Court noted that the Board's holding was consistent with *Mackay Radio* and its progeny.

[6] In *Mastro Pastics Corp.* v. *NLRB*, 350 U.S. 270, 278 (1956), the Court held that unfair labor practice strikers are entitled to reinstatement even if the employer has hired permanent replacements.

Mackay Radio, an employer need not, at the conclusion of a strike, "discharge those who worked during the strike" (*id.* at 232), the Court affirmed the Board's decision that superseniority has such a devastating effect on employees, both during and after a strike, that the employer's business interest in providing superseniority does not "outweigh the damage to concerted activities" (*ibid.*).

Finally, in *NLRB* v. *Fleetwood Trailer Co.*, 389 U.S. 375 (1967), the Court made clear that the reinstatement rights of economic strikers are not terminated merely because no jobs are available for them at the end of the strike. Initially, the Court noted (*id.* at 378) that Section 2(3) of the NLRA provides that the employee status of a striker continues until he has obtained other "regular and substantially equivalent employment." It further noted (389 U.S. at 378 (citation omitted)) that, "[i]f, after conclusion of the strike, the employer refuses to reinstate striking employees, the effect is to discourage employees from exercising their rights to organize and to strike guaranteed by §§ 7 and 13 of the Act" and that, "[a]ccordingly, unless the employer * * * can show that his action was due to 'legitimate and substantial business justifications,' he is guilty of an unfair labor practice." The Court acknowledged (*id.* at 379) that an employer has a " 'legitimate and substantial business justification[]' " "when the jobs claimed by strikers are occupied by workers hired as permanent replacements during the strike in order to continue operations." But it concluded (*id.* at 380) that an employer does not have a "legitimate and substantial business justification" for later refusing to recall strikers when it shows only that jobs had not been available at the end of the strike, particularly where, as there, the strikers have "continued to make known their availability and desire for reinstatement."

In short, under the NLRA, striking employees are entitled to reclaim their jobs so long as those jobs remain vacant and, if there are no vacancies when the strikers first offer to return to work, they are entitled to preferential consideration for vacancies that occur thereafter. See *NLRB* v. *Fleetwood Trailer Co., supra; Laidlaw Corp.* v. *NLRB*, 414 F.2d 99, 105 (7th Cir. 1969), cert. denied, 397 U.S. 920 (1970). An employer commits an unfair labor practice if, at the conclusion of a strike, it refuses to reinstate strikers to their former positions without prejudice to their seniority or other employment rights, unless it "can show that [its] action was due to 'legitimate and substantial business justifications' " (*NLRB* v. *Fleetwood Trailer Co.*, 389 U.S. at 378, quoting *NLRB* v. *Great Dane Trailers, Inc.*, 388 U.S. 26, 34 (1967)). Indeed, if "the employer's discriminatory conduct [is] 'inherently destructive' of important employee rights, * * * the [National Labor Relations] Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations" (388 U.S. at 34). But refusing to displace permament employees is a "legitimate and substantial business justification" that is not inherently destructive of those rights. *NLRB* v. *Mackay Radio & Telegraph Co.*, 304 U.S. at 345-346; *NLRB* v. *Fleetwood Trailer Co.*, 389 U.S. at 379; *NLRB* v. *Plastilite Corp.*, 375 F.2d 343 (8th Cir. 1967).[7]

[7] While the employer is not required to discharge permanent replacements to make way for returning economic strikers, the employer may accede to the union's demand that it do so. See *Belknap, Inc.* v. *Hale*, 463 U.S. at 503-504 & n.8. See also *United Steelworkers, Local 8560* (*Sparta Mfg., Div. of Spartek, Inc.*, Case No. 8-CB-3963 (Advice Mem.)), 103 L.R.R.M. 1238 (Dec. 31, 1979) (no violation of Section 8(b)(3) or (b)(2) of the NLRA (29 U.S.C. 158(b)(3) or (b)(2)) for a union to insist that seniority be used to determine the post-strike job rights of replacements and strikers). The

B. The court below plainly misapplied these principles in holding that, under precedents developed under the NLRA, the senior returning strikers were entitled to displace junior cross-over employees. As explained above (pages 8-12, *supra*), a full-term striker's reinstatement right entitles him to be recalled only when a vacancy exists. Thus, a full-term striker could have a claim on a cross-over employee's job only if the job that the cross-over employee is performing could be deemed not permanently filled during the course of the strike and, therefore, "vacant." But an employee who abandons a strike has the same entitlement to regain his job as does a full-term striker; that is, if the job is vacant at the time the cross-over employee requests reinstatement, he is entitled to return to that job at that time, just as the full-term striker is entitled to return to that job if it is unfilled at the end of the strike. Once the cross-over employee has returned to the job, there is no vacancy in that position and a returning full-term striker has no entitlement to it; likewise, with respect to employees who do not strike at all, their jobs are never vacant and full-term strikers have no claim on them. The court of appeals' contrary conclusions simply have no foundation in NLRA case law.

Board has, however, held that, in the absence of an agreement dealing with the reinstatement rights of strikers, unreinstated strikers "do not have the statutory right to recall in accordance with a collective-bargaining provision covering recall from layoffs." *Bio-Science Laboratories*, 209 N.L.R.B. 796, 796 (1974). Accord *Lone Star Indus.*, 279 N.L.R.B. No. 78, at 6 (Apr. 28, 1986). In the instant case, of course, there was no back-to-work agreement giving full-term strikers the right to bump replacements or junior cross-overs and, as the district court found (Pet. App. 22a), the collective bargaining agreement "does not authorize the exercise of seniority rights to obtain reinstatement after a strike."

The suggestion by the court below (Pet. App. 7a) that, because the union security clause requires cross-over employees to retain their union membership, refusing to displace junior cross-over employees in favor of full-term strikers discriminates on the basis of union activity is equally unfounded. The full-term strikers are not denied reinstatement because of the degree of their union activity. They are denied reinstatement because there is no available vacancy for them to fill. That, of course, is precisely why the full-term strikers are not entitled to displace any employee hired permanently to replace them; the new hires are permanently filling the striking employees' jobs and, since the cross-overs are filling their own jobs, at the end of the strike there are no vacancies for the returning strikers to fill. The union security clause, which is binding on new hires as well as on cross-over employees, has no bearing on this analysis.[8]

Nor is there any merit to respondent's contention (Br. in Opp. 6) that only new hires who are recruited as permanent replacements for strikers may be treated as permanent employees and that, accordingly, cross-over employees can only be treated as temporary replacements. The cross-over employees who went on strike but returned before the strike ended had been permanent employees before the

[8] The new hires cannot, as the court below suggested (Pet. App. 7a n.4), be distinguished from the cross-over employees because the former "were not union members when they began work during the strike" and, "[t]hus, * * * cannot be the subject of discrimination based upon union loyalty and activity." Whether they are union members or not, by working during the strike, the new hires are refusing to assist the union or to engage in union-organized concerted activity. An employer may not offer these employees permanent employment or refuse to displace them for that reason. But it may offer them permanent employment and refuse to displace them for other legitimate business reasons.

strike began. Because their jobs were still available when they offered to return to work, petitioner was obliged to reinstate them without any reduction in the tenure that they had previously enjoyed in those jobs. Had petitioner refused to do so, and deemed their reinstatement subject to defeasance upon the subsequent return of other strikers with greater seniority, it would have penalized the early returnees for striking by refusing to allow them to return to their vacant jobs; and had it reduced the tenure of employees who did not strike at all, it would have penalized them for the fact that others engaged in strike activity. Neither action would have been statutorily permissible. See generally *Pattern Makers' League of North America* v. *NLRB*, 473 U.S. 95 (1985). The statute obviously should not be interpreted to be at odds with itself.

The NLRA cases cited by the court below (Pet. App. 8a-10a) do not support its conclusion that the full-term strikers were entitled to displace the cross-over employees. Those cases involve: (1) discrimination against strikers that persists after the strikers have returned to their jobs; or (2) discrimination among strikers in selecting which ones will be offered job vacancies. See *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221 (1963) (holding unlawful the grant of superseniority status to cross-over employees and new hires but not to reinstated full-term strikers); *George Banta Co.* v. *NLRB*, 686 F.2d 10 (D.C. Cir. 1982), cert. denied, 460 U.S. 1082 (1983) (unlawful for employer to place employees who worked during the strike in jobs other than those they held prior to the strike, while assigning full-term strikers to inferior jobs); *International Ass'n of Machinists & Aerospace Workers* v. *J.L. Clark Co.*, 471 F.2d 694 (7th Cir. 1972) (holding that a factual issue was presented concerning whether a striker who abandoned a strike had returned to his own pre-strike job or to a different job claimed by a more senior employee); *Randall,*

Div. of Textron, Inc. v. *NLRB*, 687 F.2d 1240 (8th Cir. 1982), cert. denied, 461 U.S. 914 (1983) (employer violated the NLRA by giving cross-over employees a preference over unreinstated full-term strikers in bidding on special-rated jobs). None of these cases suggests that the employer is required to create vacancies for unreinstated strikers by displacing current employees.[9]

C. This Court has cautioned, of course, that the NLRA has "no direct application" to the RLA and at best serves as an interpretive analogue. See *Brotherhood of R.R. Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 377 (1969). Thus, it is possible that the RLA provides protection for returning strikers in these circumstances that the NLRA does not provide. But the court below did not rely on any such argument, and respondent has not purported to defend the judgment below on any such basis. See Br. in Opp. 5-14. Moreover, the relevant differences in the two statutory schemes point, if anywhere, in the opposite direction.[10] In sum, the NLRA does not

[9] In *Giddings & Lewis, Inc.* v. *NLRB*, 675 F.2d 926, 931 (7th Cir. 1982), the court agreed with the Board that unreinstated strikers have a right to reinstatement when a vacancy occurs. The court disagreed with the Board as to whether, in the circumstances of that case, a layoff created job vacancies. Accordingly, the court held that the employer was entitled to recall replacements and reinstated strikers from layoff status in preference to unreinstated strikers. Nothing in the court's opinion in *Giddings & Lewis* is inconsistent with the Board's position here – *i.e.*, that unreinstated strikers are only entitled to fill vacancies and not to "bump" current employees.

[10] In contrast to Section 2(3) of the NLRA, which specifies that the term "employee" includes "any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice" (29 U.S.C. 152(3)), Section 1 Fifth of the RLA, 45 U.S.C. 151 Fifth, does not expressly include strikers within the definition of the term "employee." Furthermore, because of the differing nature of the industries regulated by the two

provide the particular right of reinstatement for returning strikers that the court below found, and there is no readily apparent basis for finding any greater right of this type in the RLA.

CONCLUSION

The judgment of the court of appeals should be reversed with respect to the question presented.

Respectfully submitted.

CHARLES FRIED
Solicitor General

LOUIS R. COHEN
Deputy Solicitor General

GLEN D. NAGER
Assistant to the Solicitor General

ROSEMARY M. COLLYER
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel
National Labor Relations Board

MAY 1988

statutes and the different historical and legal contexts in which the two statutes were enacted, Congress apparently placed greater restrictions on the right of employees to resort to economic weaponry, including the strike, in the RLA than it did in the NLRA. See generally *Brotherhood of R.R. Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. at 378-379; *Florida East Cost Ry.* v. *Brotherhood of R.R. Trainmen*, 336 F.2d 172, 180-181 (5th Cir. 1964), cert. denied, 379 U.S. 990 (1965).

☆ U.S. GOVERNMENT PRINTING OFFICE: 1988—202 037/60466